IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 42 OF 2003

State
through Public Prosecutor,
High Court of Bombay,
At Panaji. ... Appellant.

versus

1. Joao @ Badgi Fernandes,
   H.No. 50, Madda - Wado,
   Calangute, Bardez - Goa.

2. Mansukh Gujarati
   @ Mansukh Merabai
   Karkodia,
   R/o. Natwargad Vagharivas,
   Limbdi Police Station,
   Surendranagar District,
   Tal : Limbdi, Gujarat,
   at present Khobra-wado,
   Calangute - Goa(absconding) ... Respondents.

Mr. S. N. Sardessai, Public Prosecutor for the State.

Mr. A. P. Lawande, Advocate for Respondent No.1.

CORAM : A. M. KHANWILKAR &
P. V. HARDAS, JJ.

DATED : 15TH DECEMBER, 2003.

ORAL JUDGMENT(PER P. V. HARDAS, J.)

The State being aggrieved by the Judgment of the learned Sessions Judge, Panaji, dated 28th

February, 2003, in Sessions Case No. 40 of 2001, acquitting the Respondent No.1/Accused for an offence punishable under Sections 302 and 307 of the Indian Penal Code, has filed the present Appeal challenging the aforesaid Judgment.

2. The facts, as are necessary for the decision of this Appeal are set out hereunder:-

P.W.12, P.I. Gundu Naik, who was attached to the Calangute Police Station referred P.W.4, Sanjay Kumar Singh and injured Ajay Pal Singh to the Goa Medical College on 10th May, 2001. At about 00.45 hours of 11th May, 2001, P.W.4, Sanjay Kumar Singh returned back to the Police Station and filed a complaint at Exh.20. The complaint was filed against the present Respondent No.1 and one Mansukh Gujarati, who was absconding and was never put to trial. On the basis of the said complaint, an offence came to be registered and the scene of the offence panchanama came to be drawn at Exh.36 in the presence of the witnesses. Exh.44 is the sketch of the scene of the offence. Sample of control mud and blood mixed with mud was attached. Since the deceased had succumbed to his injury, Inquest Panchanama at Exh.37 was drawn. The Post Mortem on the dead body of deceased Ajay Pal Singh was conducted by P.W.7, Dr. E. J. Rodrigues,

who found one incised wound of 3 x 0.5 cms. obliquely placed, 75 cms. above right heel and 22 cms. below right anterior superior ilias spine, situated in upper portion of middle front of right thigh. He found that the wound had made a corresponding cut in sub-cutaneous tissue thigh muscle and the fumoral vessel at that level with extensive extra vassation of blood all along the track of wound. He opined that the injury was caused by sharp pointed penetrating weapon and was ante-mortem in nature. He, therefore, opined that death was due to haemorrhage and shock as a result of the said injury. The Post Mortem Report is at Exh.27. A motor-cycle bearing registration No.GA-01-Q-0070 which was found at the scene of the offence was attached under a panchanama and during the trial came to be released to Respondent No.1 herein vide an Order of the Trial Court dated 2nd January, 2002.

3. On 12th May, 2001, Respondent No.1 herein came to be arrested. The Arrest Panchanama, Exh.10, was drawn in the presence of P.W.1, Manoprasad Poudal. On 13th May, 2002, the Accused was sent for medical examination and was examined by P.W.7, Dr. E. J. Rodrigues. The finger nail clippings and the scalp hair of the Accused were preserved. He did not notice any other injury on the person of the Accused. The

Report in respect of the examination of the Accused is at Exh.30. The Blood Group of the Accused vide Exh.31 was O Rh Positive while that of the deceased vide Exh.28 was O Rh Negative. On 15th May, 2001, Respondent No.1/Accused is alleged to have volunteered to discover the weapon of the assault which came to be recovered in the presence of P.W.5, Francis Fernandes. The panchanama of the Disclosure Statement and the recovery is at Exh.45.

4. On 23rd May, 2001, P.W.9, Yogesh Singh, was examined and his Certificate is at Exh.41. The said Certificate discloses that P.W.9, Yogesh Singh, had a scar(healed) 2 x 3 cms. on right side chest wall. On 28th May, 2001, P.W.9, Yogesh Singh, was examined by P.W.7, Dr. E. J. Rodrigues, who also noticed a healed linear scar of 3 cms. obliquely placed with tailing outwards. The Certificate is at Exh.29. On 29th June, 2001, P.W.2, Vinayak Alornekar, Special Judicial Magistrate, was requested to hold a test identification parade. P.W.2, Vinayak Alornekar, held the test identification parade on 5th July, 2001 and on 26th July, 2001. The Memorandums of the test identification parade are at Exhs. 13 and 14. On 7th August, 2001, the muddemal articles were forwarded to the Central Forensic Science Laboratory at Hyderabad for examination. The Report of the Chemical Analyser

is at Exh.42 colly. Blood was detected on the knife which came to be seized at the instance of Respondent No.1. After completion of the investigation, a charge-sheet against the present Respondent No.1 came to be filed.

5. On committal of the case to the Court of Sessions, the learned Sessions Judge, Panaji, vide Exh.6 framed a charge against Respondent No.1/Accused for an offence punishable under Section 302 r/w 34 of the Indian Penal Code. Respondent No.1/Accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 12 witnesses. The learned Sessions Judge, Panaji, disbelieving the prosecution case, for reasons which we shall shortly advert to, acquitted Respondent No.1. The State being aggrieved by the acquittal of Respondent No.1/Accused has filed the present Appeal.

6. Mr. S. N. Sardessai, learned Public Prosecutor appearing on behalf of the State has submitted that the learned Trial Court has rejected the evidence of material witnesses on pure conjectures and surmises and the view taken by the learned Trial Court is not a possible view on the basis of the evidence and, therefore, prays that the acquittal of Respondent No.1 be reversed.

7. Mr. A. P. Lawande, learned Counsel appearing on behalf of Respondent No.1/Accused has submitted that the view taken by the learned Trial Court is a possible view on the basis of the evidence on record and merely because two views are possible, the acquittal need not be interfered with. In the alternative, he has submitted that the offence alleged against Respondent No.1/Accused would not be an offence punishable under Section 302 of the Indian Penal Code but would be an offence punishable under Section 304(Part II) of the Indian Penal Code.

8. The pivot of the prosecution case is the evidence of P.W.4, Sanjay Kumar Singh. P.W.4, Sanjay Kumar Singh, states that deceased Ajay Pal Singh was his brother and they were four brothers residing at Calangute in a rented house at the time of the incident. At the time of the incident, his father, P.W.6, Rotan Singh, had come from Agra and was staying with them at Calangute. They run a Bar and Restaurant and a Punjabi Dabba. He further states that on 10th May, 2001, at about 10.30 p.m., deceased Ajay Pal Singh closed the Punjabi Dabba and went to the Bar and Restaurant named Sher e Punjab. At that time, P.W.4, Sanjay Kumar Singh was in the Sher e Punjab Hotel attending to the customers. Deceased Ajay Pal Singh took the keys of a Sumo jeep and proceeded to the

residence which was at a distance of about 2 1/2 kms. Within 5 to 10 minutes thereafter, he received a telephone message from P.W.8, Asha Pal Singh, wife of Ajay Pal Singh, informing P.W.4, Sanjay Kumar Singh, that he should immediately come to the residence as some thief had entered the house. On getting the said message, P.W.4, Sanjay Kumar Singh, immediately proceeded towards his residence on his scooter. When he was at a distance of about 20 to 25 metres from his house, he crossed two persons who were running in the opposite direction i.e. coming from the direction of his house. He had identified the said two persons as the present Respondent No.1/Accused and one Mansukh. He also saw the Sumo jeep parked near the gate of the house and saw that his brother Ajay Pal Singh had fallen on the ground near the door of the driver's side. He also saw his father P.W.6, Rotan Singh and P.W.9, Yogesh Singh trying to lift his brother Ajay Pal Singh. He, therefore, asked his brother Ajay Pal Singh as to what had happened and Ajay Pal Singh replied stating that he had been assaulted with a knife on his thigh on the right side. Ajay Pal Singh had also stated that two persons suddenly came near him when he was alighting from the jeep and had assaulted him. P.W.4, Sanjay Kumar Singh, tied a cloth in order to stem the flow of blood. P.W.4, Sanjay Kumar Singh, has further stated that he saw a

bullet motor-cycle bearing registration No.GA-01-Q-0070 lying in front of the Sumo jeep. P.W.6, Rotan Singh, also informed P.W.4, Sanjay Kumar Singh that in their attempt to stop Respondent No.1 and the other person from running away, Respondent No.1 herein had assaulted P.W.9, Yogesh Singh with stones and had assaulted P.W.6, Rotan Singh, with a knife. P.W.4, Sanjay Kumar Singh, further states that he had seen a knife in the hand of Respondent No.1 while he was running. He states that there was an electric bulb of 100 watts which was burning in their balcony and had also seen Respondent No.1 and Mansukh in the head light of his scooter. He states that he was knowing Respondent No.1 since about 2 to 3 years prior to the incident. He states that he put Ajay Pal Singh in the Sumo jeep and took him to the Calangute Police Station from where Ajay Pal Singh was taken to the Goa Medical College. After Ajay Pal Singh had succumbed to his injury, P.W.4, Sanjay Kumar Singh, returned back to the Police Station and filed a complaint at Exh.20. He has identified the knife M.O.12 as the same knife which he had seen in the hand of Respondent No.1. In the cross-examination, he has admitted that P.W.8, Asha Pal Singh, was descending the stair case when he was about to reach the house. He further states that she was present when he asked his brother Ajay Pal Singh as to what had happened to

him. He has also stated that he had seen something like a stone in the hand of Mansukh when he was running away from the spot. He has further stated in the cross-examination that the knife which Respondent No.1 was having in the hand was glinting in the headlight of his scooter. Omission has been brought out in respect of his complaint that he had not stated that his father had told him that they were trying to stop Respondent No.1/Accused and at that time, Respondent No.1/Accused had assaulted his father with a knife and his younger brother Yogesh Singh was assaulted with stone. He has denied to have stated in his complaint that when his father and brother Yogesh Singh went to rescue his brother, the assailants were trying to attempt to assault him with a knife. He has also denied to have stated in his complaint that the assailants also threw stones at his younger brother Yogesh Singh. He has further admitted in the cross-examination that Respondent No.1/Accused used to pass by the side of his hotel frequently and this is how he was knowing Respondent No.1/Accused. There is no effective cross-examination in respect of the statement of this witness that he had seen Respondent No.1/Accused running with a knife in his hand and that his brother Ajay Pal Singh had told him about the assault.

9. The evidence of P.W.4, Sanjay Kumar Singh, is amply corroborated by his complaint at Exh.20. In the complaint at Exh.20, he has stated about seeing Respondent No.1/Accused and the other person Mansukh running with knives in their hands. In Exh.20, there is also recital about deceased Ajay Pal Singh informing him that it was Respondent No.1 and Mansukh who had attacked him with knives and caused injury without any provocation. In the F.I.R., there is no mention about any injury sustained by P.W.9, Yogesh Singh.

10. The learned Trial Court in paragraph 5 of the Judgment has disbelieved the evidence of this witness on the ground that (1) slight discrepancy in respect of what P.W.8, Asha Pal Singh, actually informed him on telephone and (2) that it must have taken P.W.4, Sanjay Kumar Singh some time to reach his residence and it was unlikely that the Respondent would remain at the scene of the offence. (3) According to P.W.4, Sanjay Kumar Singh, he had seen P.W.8, Asha Pal Singh descending from the stair case, which is contrary to the statement of P.W.8, Asha Pal Singh. (4) P.W.4, Sanjay Kumar Singh, stated that he had seen a stone in the hand of Mansukh and since he had stated that Mansukh also had a knife in his hand, it was incredible that he would see a stone in the

hand of Mansukh and (5) there were material contradictions which impelled the learned Trial Court to reject the evidence of P.W.4, Sanjay Kumar Singh.

11. P.W.8, Asha Pal Singh, wife of Ajay Pal Singh states that she and her brother-in-law Bajrang were in the house. A theft had taken place in her house on 30th April, 2001 and after about two days thereafter, she had received an anonymous call telling her that she should keep all her gold ornaments "ready" without informing anyone. She was also threatened that in case she divulged this information, she would be killed. According to her, she informed about this incident to her husband and P.W.4, Sanjay Kumar Singh. Her husband had reported this matter to the Police. On the day of the incident i.e. on 10th May, 2001, at about 9.30 p.m. P.W.6, Rotan Singh and P.W.9, Yogesh Singh had come home from the hotel. She along with her brother-in-law Bajrang sat for having their dinner and after dinner were watching T.V. programmes. At about 10.00 p.m. she heard some noise of a vehicle near her house and immediately thereafter heard the noise of quarrel. At that time, she was on the first floor of the house and saw that two persons had caught her husband and were assaulting him with a knife. She immediately informed P.W.6, Rotan Singh and P.W.9, Yogesh Singh. P.W.6, Rotan Singh and

P.W.9, Yogesh Singh went downstairs to see what was happening. P.W.6, Rotan Singh and P.W.9, Yogesh Singh, went to separate the said persons who were fighting with her husband. She saw that her husband had fallen on the ground. She also saw that her brother-in-law P.W.9, Yogesh Singh, had fallen on the ground. P.W.6, Rotan Singh, told her to inform the incident to P.W.4, Sanjay Kumar Singh, who was at the hotel and she informed P.W.4, Sanjay Kumar Singh about the incident requesting him to come home immediately on account of fight. According to her, she had asked the person who had assaulted her husband as to why he had assaulted her husband. According to her, the other person i.e. Mansukh had covered his face partly with a white cloth. Respondent No.1/Accused had also given threats for assaulting her. The two assailants had come on a bullet motor-cycle and she along with P.W.6, Rotan Singh tried to stop the motor-cycle. Respondent No.1/Accused tried to assault P.W.6, Rotan Singh with a knife but P.W.6, Rotan Singh successfully evaded the attack of knife. In the meantime, she saw her brother-in-law coming on a scooter and at that moment, Respondent No.1/Accused and the other person went away. In the cross-examination, she has admitted that she had come to the gallery of the house on the first floor and had partly seen the incident from that place. The place of the incident was just below the

first floor of her house. She has also admitted in the cross-examination that she followed her father-in-law to the place of the incident immediately and P.W.4, Sanjay Kumar Singh had come to the place of the incident after about 10 minutes of the telephone call. According to her, Respondent No.1/Accused on seeing P.W.4, Sanjay Kumar Singh coming to the place of the incident went by another route.

12. It is true that according to P.W.8, Asha Pal Singh, she was already near her husband when P.W.4, Sanjay Kumar Singh had come. According to her, she had informed P.W.4, Sanjay Kumar Singh about the fight. The evidence of P.W.4, Sanjay Kumar Singh, is that P.W.8, Asha Pal Singh, had informed him that some thief had entered the house and when he was nearing his house, he had seen P.W.8, Asha Pal Singh descending the stair case. The fact however remains that P.W.4, Sanjay Kumar Singh, had reached the house because of the telephone call of P.W.8, Asha Pal Singh. Different people on perceiving an incident/quarrel react differently. P.W.8, Asha Pal Singh, had witnessed the incident, at least a part of the incident from the balcony of the house. Thereafter, according to her, she had informed P.W.6, Rotan Singh and P.W.9, Yogesh Singh. It was P.W.6, Rotan Singh, who suggested to her to inform P.W.4,

Sanjay Kumar Singh. In that background, no importance at all can be attached to the discrepancy regarding informing P.W.4, Sanjay Kumar Singh about either "fight" or "thieves". Even otherwise, anticipating some unto incident, persons are prone to make either incoherent or unintelligible statements. It is not surprising, therefore, in that state of mind and specially in a hurry to summon P.W.4, Sanjay Kumar Singh, that she may not have informed him about the fight with Ajay Pal Singh but had only informed him about some thieves entering the house. Apart from that, the discrepancy in what P.W.8, Asha Pal Singh informed P.W.4, Sanjay Kumar Singh, according to us, firstly is not the discrepancy of a nature which would render the presence of P.W.4, Sanjay Kumar Singh at the scene of offence doubtful and secondly, the alleged discrepancy is not on a vital aspect of the prosecution case which would have rendered their versions doubtful. The presence of P.W.8, Asha Pal Singh, at the scene of offence is not rendered doubtful at all. Presence of P.W.8, Asha Pal Singh, is amply corroborated by the presence of P.W.6, Rotan Singh and P.W.9, Yogesh Singh as well as by P.W.4, Sanjay Kumar Singh. Therefore, what P.W.8, Asha Pal Singh narrated to P.W.4, Sanjay Kumar Singh is, therefore, unimportant for judging the presence of P.W.4, Sanjay Kumar Singh at the scene of offence.

P.W.4, Sanjay Kumar Singh, noticed the two Accused running and has positively identified Respondent No.1 herein. His presence at the scene of offence cannot be doubted as a surmise that it would have taken him 5 to 10 minutes to reach the scene of offence and the Appellant would not wait that long at the scene of offence. Reliable and cogent evidence of witnesses cannot be disbelieved on mere surmises unless the Court finds the version of a witness to be inherently doubtful. At the close of the cross-examination, P.W.4, Sanjay Kumar Singh, emerges as a truthful witness and, therefore, his evidence can safely be accepted. Reasons given by the learned Trial Court, which have been referred to above, are wholly unsustainable. It is the duty of a Court to separate the exaggerations made by a witness on non vital aspects of the case and if after separation of the exaggerations and the embelishments, the Court should endeavour to find out if the evidence of a witness is believable and if the core of the evidence of the witness on the vital aspect of the prosecution case remains unaffected by cross-examination the Court should not jettison the evidence of such witness on fanciful grounds and surmises. Therefore, according to us, the evidence of P.W.4, Sanjay Kumar Singh, can be relied upon to the extent that he on receiving a

telephonic message from P.W.8, Asha Pal Singh, rushed to his residence and when he was at a distance of about 20 to 25 metres from his house, he saw Respondent No.1/Accused and the other Accused running towards him armed with a knife. At the scene of offence, he found his brother deceased Ajay Pal Singh lying on the ground with a bleeding injury and Ajay Pal Singh had disclosed to him that two persons had attacked him with knives. P.W.4, Sanjay Kumar Singh, has unerringly identified Respondent No.1/Accused as the person who was seen running. A motor-cycle was lying at the scene of offence which is said to be belonging to Respondent No.1 and which came to be released in his favour during the trial.

13. P.W.6, Rotan Singh, father of deceased Ajay Pal Singh states that he along with his son P.W.9, Yogesh Singh, daughter-in-law, P.W.8, Asha Pal Singh and another son named Bajrang were present in the house on the day of the incident. At about 11.00 p.m., deceased Ajay Pal Singh had come home from the hotel in a Sumo jeep. P.W.6, Rotan Singh and P.W.9, Yogesh Singh had come prior to the arrival of Ajay Pal Singh as P.W.9, Yogesh Singh was having stomach-ache. His son Bajrang saw that Ajay Pal Singh was being attacked and Bajrang informed P.W.6, Rotan Singh accordingly. At that time, Bajrang and P.W.8, Asha

Pal Singh were on the first floor. He, P.W.9, Yogesh Singh and P.W.8, Asha Pal Singh, went to the scene of offence. P.W.9, Yogesh Singh, was sitting on the ground with deceased Ajay Pal Singh in his arms. Ajay Pal Singh had sustained a bleeding injury on his right thigh. On being asked, Ajay Pal Singh had disclosed the names of the assailants as Joao @ Badgi and Mansukh. P.W.6, Rotan Singh, further states that he had seen Respondent No.1/Accused with a knife who had come on a bullet motor-cycle. When he reached the scene of offence, he saw that Respondent No.1/Accused was about to leave on his motor-cycle and, therefore, he pushed Respondent No.1 and Respondent No.1 in turn pushed him. He requested P.W.8, Asha Singh to inform P.W.4, Sanjay Kumar Singh about the incident. When P.W.4, Sanjay Pal Singh arrived, Respondent No.1 and Mansukh were going away from the scene of the incident. In the cross-examination, he has admitted that when his son came to inform him about the attack on Ajay Pal Singh, he was lying on a cot. Omission was brought out in respect of Bajrang seeing the attack on Ajay Pal Singh. Omission was also brought out in respect of Ajay Pal Singh disclosing the names of the assailants. He has admitted that though he had seen Respondent No.1, he could not identify Respondent No.1 before the Special Judicial Magistrate in a test identification parade as four other persons in the

parade were having similar features. The learned Trial Court has rejected the evidence of P.W.6, Rotan Singh, on the ground that there were discrepancies in the evidence of P.W.6, Rotan Singh and P.W.8, Asha Singh. The learned Trial Court also found that the evidence of P.W.6, Rotan Singh was recorded on 23rd May, 2001 i.e. after 13 days of the incident. In the absence of satisfactory explanation, the learned Trial Court did not place reliance on the evidence of P.W.6, Rotan Singh. Presence of P.W.6, Rotan Singh, in the house on the day of the incident, is not rendered doubtful despite searching. There is nothing inherent in his testimony which would otherwise impel the Court to infer that P.W.6, Rotan Singh, was not present. Though, there are discrepancies in the evidence of P.W.6, Rotan Singh and P.W.8, Asha Pal Singh, the discrepancies are not on vital aspects of the prosecution case but on the aspects whether it was P.W.8, Asha Pal Singh or Bajrang who informed P.W.6, Rotan Singh. Testimony of two witnesses, who had witnessed a ghastly incident, can never be identical. The Courts should not expect the testimonies of two witnesses to be absolutely identical to each other. Passage of time and age are factors which erode the memory. Different persons recapitulate the incident differently, missing minor details or exaggerating on some minor aspects. The Courts instead of jettisoning

the evidence of such witnesses should endeavour to segregate the discrepancies or the exaggerations on the minor aspects of the case and see if the sum and substance of the evidence of the testimony of the witness on the vital aspect of the prosecution case is affected. To expect absolutely identical testimonies is an unrealistic approach. In the present case, the learned Trial Court has rejected the evidence of P.W.6, Rotan Singh, on the grounds which are unsustainable.

14. P.W.9, Yogesh Singh, states that on the day of the incident at about 11.00 p.m., P.W.8, Asha Pal Singh, awakened him and told him that Ajay Pal Singh was caught by two persons. He descended to the ground floor and saw that Ajay Pal Singh had sustained a bleeding injury on his thigh. Ajay Pal Singh then fell on the ground. He has identified Respondent No.1 as one of the persons present at the scene. He further states that he had seen a knife in the hand of Respondent No.1/Accused. He also states that Respondent No.1/Accused was saying that Ajay Pal Singh had come after "causing accident to them". He also states that Respondent No.1/Accused inflicted an injury on his right side of chest. According to him, the other person had covered his face with a cloth. According to him, P.W.6, Rotan Singh and P.W.8, Asha

Pal Singh, came to the scene and thereafter, his brother P.W.4, Sanjay Kumar Singh, came at the scene on a scooter. As P.W.4, Sanjay Kumar Singh, was approaching the house, Respondent No.1/Accused and the other person ran away. The motor-cycle on which the Respondents/Accused had come was lying near their house. In the cross-examination, he has admitted that P.W.6, Rotan Singh, and P.W.8, Asha Pal Singh, immediately followed him to the place of the incident. They were at the scene till the arrival of P.W.4, Sanjay Kumar Singh. According to him, he had heard the Accused shouting that the deceased had come "after committing the accident". According to him, he had heard this while descending the steps. He has admitted that the distance between their house and the hotel can be covered in 5 minutes on his scooter. He has admitted that he did not show his injury to anyone in Goa. He has also admitted that on the day of the incident, he had gone to the Calangute Police Station but did not show the injury to the Police. Importantly, he has stated that on the next day of the incident, he, P.W.6, Rotan Singh and Bajrang had gone to his native place in U.P. and returned back on 23rd May, 2001. The learned Trial Court has disbelieved the evidence of P.W.9, Yogesh Singh, on the ground that there were discrepancies inter se between the evidence of P.W.6, Rotan Singh, P.W.8, Asha Pal Singh

and P.W.9 Yogesh Singh. According to the learned Trial Court, since P.W.8, Asha Pal Singh, has not stated that P.W.9, Yogesh Singh was sleeping when she informed him, is one of the grounds to disbelieve the testimony. P.W.9, Yogesh Singh, has stated about the Accused stated that the deceased had come after committing an accident. This part of the evidence is not supported either by P.W.6, Rotan Singh or P.W.8, Asha Pal Singh. The claim of P.W.9, Yogesh Singh, that Mansukh(absconding Accused) had covered his face with a cloth is not supported by the evidence of P.W.4, Sanjay Kumar Singh. The learned Trial Court doubted the identity of the Accused as he had covered his face. The learned Trial Court, therefore, found the evidence of P.W.9, Yogesh Singh, to be not reliable. We find that the reasons given by the learned Trial Court for discarding the evidence of P.W.9, Yogesh Singh is wholly unsustainable. As stated by us earlier, minor variations in the evidence of the witnesses is not a ground to reject otherwise reliable testimony of natural witnesses. The fanatical adherance on the insistence of corroboration of the testimony of one witness with mathematical precision is an unrealistic approach, which does not take into account the various factors which result in the variations creeping in the evidence of the witnesses. Suffice it to say that the reasons

according to us are wholly unsustainable.

15. That takes us to the discovery of the knife M.O.12, at the instance of the Accused. P.W.5, Francis Fernandes, states that on 15th May, 2001, the Accused had made a statement that he had kept the knife under a mango tree at Arpora beach. After recording the statement of the Accused, the Police party, the panch and the Accused proceeded to the place disclosed by the Accused. The Accused went near a mango tree and after digging some earth from the place removed the knife. In the cross-examination, this witness has admitted that he was knowing P.W.12, P.I. Gundu Naik, 3 years prior to the incident. The Accused had given a statement in Konkani which was translated into English. P.W.12, P.I. Gundu Naik, has only stated that on 15th May, 2001, the Accused had volunteered to discover the weapon of assault and it was recovered at his instance.

16. Mr. A. P. Lawande, learned Counsel appearing on behalf of Respondent No.1/Accused has attacked the seizure of the knife at the instance of the Appellant on the ground that the statement is not recorded in the language of the Accused. We see no reason to doubt the correctness of the statement of the witnesses nor do we see any reason to doubt the

discovery of the knife at the instance of the Accused only on the ground that the statement of the Accused was not recorded in the language of the Accused. So long as there is no dispute regarding the translation, we see no reason to discredit that piece of evidence. The knife M.O.12, is found stained with blood.

17. The next circumstance against the Accused is the identification parade conducted by P.W.2, Vinayak Alornekar. The Accused is alleged to have been arrested on 12th May, 2001 and the identification parade was conducted on 5th July, 2001 and 26th July, 2001. There is an enormous delay in the conduct of the identification parade and, therefore, according to us, no reliance can be placed on the identification parade. However, the rejection of the test identification parade, according to us, does not materially affect the prosecution case.

18. According to us, therefore, the evidence of P.W.4, Sanjay Kumar Singh, P.W.6, Rotan Singh, P.W.8, Asha Pal Singh and P.W.9, Yogesh Singh, in respect of the attack on the deceased Ajay Pal Singh can safely be accepted. P.W.4, Sanjay Kumar Singh, saw Respondent No.1/Accused running from the scene of the offence with a knife in his hand. Deceased Ajay Pal Singh had disclosed that he had been attacked by two

persons. A motor-cycle belonging to the Accused was found at the scene of the offence. These factors, therefore, according to us, connect the Accused with the commission of the crime. The Accused has been identified by P.W.6, Rotan Singh, P.W.8, Asha Pal Singh and P.W.9, Yogesh Singh and we see no reason to doubt their identification though the evidence of the test identification parade cannot be relied upon. In respect of the charge under Section 307 of the Indian Penal Code, for having caused injury to P.W.9, Yogesh Singh, according to us, the prosecution has not been able to establish this charge. None of the witnesses specially P.W.4, Sanjay Kumar Singh, P.W.6, Rotan Singh and P.W.8, Asha Pal Singh, speak about any injury to P.W.9, Yogesh Singh. P.W.9, Yogesh Singh, had also not disclosed about the injury to anyone nor had any treatment been given to him. He was examined by P.W.7, Dr. E. J. Rodrigues, on 28th May, 2001 and he had only noticed a healed linear scar. The evidence in respect of the nature of the injuries is not before the Court and it appears really doubtful whether any injury as claimed was caused to P.W.9, Yogesh Singh. We have rejected the evidence of P.W.9, Yogesh Singh in respect of causation of injury to him. His testimony on other aspects of the prosecution case remains unaffected. We, therefore, confirm the acquittal of Respondent No.1/Accused for an offence

punishable under Section 307 of the Indian Penal Code.

19. Mr. A. P. Lawande, learned Counsel appearing on behalf of Respondent No.1/Accused has submitted that the injury caused to Ajay Pal Singh was a single injury on his left thigh. From the evidence of P.W.9, Yogesh Singh, it appears that the injury was caused on the spur of the moment. The attack on Ajay Pal Singh was not a preplanned attack and none of the witnesses have been able to ascribe any motive. Therefore, it is submitted that the Accused had no intention to cause death of Ajay Pal Singh and thus, the Accused would be guilty of an offence punishable under Section 304 of the Indian Penal Code. Reliance for this submission is placed on the Judgment of the Apex Court in **Jagtar Singh** v. **State of Punjab** reported in AIR 1983 SC 463. The Apex Court in paragraph 7 has held thus:-

> "The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which

> is shown to have caused death. There was no premeditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this back-ground the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in **Jagrup Singh** v. **State of Haryana,** (1981) 3 SCC 616 : (AIR 1981 SC 1552). It was subsequently followed in **Randhir Singh** v. **State of Punjab** decided on September 18, 1981 : (reported in AIR 1982 SC 55) and **Kulwant Rai** v. **State of Punjab** (Criminal Appeal No.630/81 decided on August 7, 1981 : (reported in AIR 1982 SC 126). Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under Section 302 I.P.C. and sentence of imprisonment for life are liable to be set aside".

20. We have given our anxious consideration to the submission of the learned Counsel and we find that the submission is not without merit. From the evidence of P.W.9, Yogesh Singh, it appears that the Accused had stated that the deceased had come after

committing an accident. Admittedly, the prosecution has not alleged any enemity between the deceased and the Accused. An altercation appears to have ensued after the accident. In that heated altercation or on the spur of the moment, the Accused appears to have dealt a blow on the thigh of the deceased. The injury was not on any vital part of the body and the Accused, therefore, cannot be ascribed with an intention to commit the murder of the deceased. At the same time, since the Accused had used a knife to inflict the injury, knowledge can certainly be attributed to the Accused that an injury if inflicted on thigh is likely to cause death. Therefore, according to us, the offence would fall in the second part of Section 304 of the Indian Penal Code. We, therefore, hold the Accused guilty for an offence punishable under Section 304 (Part II) of the Indian Penal Code.

21. The Accused and his learned Counsel are heard on the point of sentence. The Accused has stated that he is a fisherman and is the sole earning member to support a family consisting of his wife and daughter. He has also to support an aged mother. The Accused, therefore, pleads that a lenient view may be taken.

22. We see no reason to release the Accused on the sentence of imprisonment undergone by him. According to us, therefore, a sentence of Rigorous Imprisonment for 5 years and payment of fine of Rs.2000/- and awarding of compensation of Rs.10,000/- would meet the ends of justice. Accordingly, Respondent No.1/Accused is convicted for an offence punishable under Section 304 {Part II) of the Indian Penal Code and is sentenced to undergo Rigorous Imprisonment for 5 years and pay fine of Rs.2000/-, in default Rigorous Imprisonment for 1 month. The Respondent No.1/Accused is also sentenced to pay compensation of Rs.10,000/- under Section 357(3) of the Code of Criminal Procedure and the compensation if recovered be paid to P.W.8, Asha Pal Singh, widow of Ajay Pal Singh. Respondent No.1/Accused shall be entitled for set off under Section 428 of the Code of Criminal Procedure. Bail Bonds of the Accused stand cancelled. Respondent No.1/Accused is granted 6 weeks time to surrender to serve the sentence.

23. The Appeal thus partly succeeds. The acquittal of Respondent No.1/Accused for an offence punishable under Section 307 of the Indian Penal Code is confirmed and his acquittal for an offence punishable under Section 302 of the Indian Penal Code

is set aside and is convicted under Section 304(2) of the Indian Penal Code and sentenced as aforestated.

A. M. KHANWILKAR, J.

P. V. HARDAS, J.

RD.